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IN THE SUPREME COURT OF OHIO

No. 32938

MOTORS INSURANCE CORPORATION, A CORPORATION, THE AVONDALE MOTOR CAR COMPANY, A CORPORATION, FRED KAHN, AND JOHN L. CASHMAN, FOR THEMSELVES AND OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

vs.

WALTER A. ROBINSON, AS SUPERINTENDENT OF INSURANCE OF OHIO AND ROBERT L. MOULTON, AS DIRECTOR OF COMMERCE OF OHIO,

Defendants-Appellees

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiffs-appellants, Motors Insurance Corporation, The Avondale Motor Car Company and John L. Cashman (plaintiff Fred Kahn being deceased), submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final judgment of the Supreme Court of Ohio entered in this cause.

Opinions Below

The judgment of the Supreme Court of Ohio dismissing appellants' appeal from the judgment of the Court of Appeals of Franklin County, Ohio is reported, 157 Ohio St. 354.[1] A copy of the judgment is attached hereto as Appendix A. The Supreme Court of Ohio, in accordance with its practice, wrote no opinion accompanying its judgment or accompanying its denial of appellants' motion to certify.

The opinion of the Court of Appeals of Franklin County, Ohio which accompanied its judgment affirming the judgment of the Common Pleas Court of said County, is not officially reported, but may be found in 62 Ohio Law Abstracts 72.[2] A copy of the opinion is attached hereto as Appendix B.

The opinion of the Common Pleas Court of Franklin County, Ohio which accompanied its judgment sustaining appellees' demurrer to appellants' petition herein is not officially reported, but may be found in 62 Ohio Law Abstracts 58.[3] A copy of the opinion is attached hereto as Appendix C.

Jurisdiction

The decision of the Supreme Court of Ohio, the highest court of the State, was announced March 19, 1952. Application for rehearing filed April 2, 1952, was denied April 23, 1952. Rule XX, Section 1 of the Supreme Court of Ohio permits an application for rehearing of a cause or motion to be made within fourteen days after the announcement of the decision.

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[1] "Ohio Bar", Apr. 7, 1952.
[2] "Ohio Bar", May 12, 1952.
[3] "Ohio Bar", May 12, 1952.

A petition for appeal is presented herewith to the Honorable Carl V. Weygandt, Chief Justice of the Supreme Court of Ohio, on July 1, 1952. The appeal is timely. Title 28 U.S.C. Sec. 2101 (c); *Market Street Railway Co.* v. *Railroad Commission,* 324 U. S. 548, 552; *Department of Banking* v. *Pink,* 317 U.S. 264, 266; *Chicago G. W. R. R. Co.* v. *Bashan,* 249 U.S. 164.

The suit was brought to enjoin the Superintendent of Insurance of Ohio and the Director of Commerce of Ohio, acting under color of the Superintendent's interpretation of certain Ohio statutes, from depriving appellants (other than Motors Insurance Corporation) and those represented by them—all of whom are automobile dealers or employes thereof nominated by Motors Insurance Corporation as its insurance agents—of their right to act or qualify to act as insurance agents of that corporation in soliciting and selling motor vehicle physical damage and theft insurance, in excess of a limitation prescribed under color of such interpretation, to purchasers of automobiles from them, and from thus depriving Motors Insurance Corporation and such others of the right to conduct an insurance business without regard to such limitation.

The validity of the Ohio statutes, as so construed and applied, was specifically drawn in question by appellants as being repugnant to the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. This was done in appellants' petition for injunctive relief filed in the Common Pleas Court of Franklin County, Ohio, in which they challenged the correctness of the construction and application given by the Superintendent of Insurance to the Ohio statutes involved and, in the alternative, contended that such construction and application, if correct, would render the statutes void for the foregoing reasons particularized in the petition (pars. 16, 18, 19). The Common Pleas Court having sus-

tained appellees' demurrer to the petition and appellants having elected not to plead further, final judgment was entered against them, and they immediately appealed to the Court of Appeals of that county. In that Court the identical questions were raised by assignments of error, as follows:

> "5. The Common Pleas Court erred in holding that said statutes, if construed as the defendants and said court construe them, are valid.
>
> "Said court should have held that, if so construed, said statutes would be violative of Article I, Section 1 of the Constitution of Ohio and of the Fourteenth Amendment of the Constitution of the United States, in that they would deprive the plaintiffs and those represented by them of their property, and the individual plaintiffs and represented individuals of their liberty, without due process of law; and would also be violative of Article I, Section 2 of the Constitution of Ohio, and of the Fourteenth Amendment of the Constitution of the United States, in that they would deny to the plaintiffs and those represented by them the equal benefit and protection of the laws; and that, if so construed, said statutes would, in their application to the plaintiffs and others in like situation, be void.
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> "6. The Common Pleas Court erred in holding that the manner in which said statutes had been and were threatened to be applied by the defendants therein is valid.
>
> "Said court should have held that said manner of application, hereinabove described, is violative of each and all of the constitutional provisions enumerated in the last preceding assignment, and therefore, void."

The Court of Appeals affirmed the judgment of the Common Pleas Court. Appellants, within time, appealed to the Supreme Court of Ohio and in addition moved it to certify the record of the Court of Appeals on the ground that the case was of public and great general interest, thus satisfy-

ing all conditions suggested in *Stratton* v. *Stratton*, 239 U.S. 55. *Matthews* v. *Huwe*, 269 U.S. 262, 265-6; *Tumey* v. *Ohio*, 273 U.S. 510, 515; *American Railway Express Co.* v. *Levee*, 263 U.S. 19, 20. The constitutional questions were raised in the Supreme Court of Ohio by identical assignments of error. The Supreme Court of Ohio denied the motion to certify and, on appellees' motion, dismissed the appeal on the ground that it presented no debatable constitutional question. (Appendix A.)

The jurisdiction of the Supreme Court of the United States to review this decision by appeal is conferred by Title 28, U.S.C., Section 1257(2). *Hartford Steam Boiler Inspection & Insurance Co.* v. *Harrison*, 301 U.S. 459; *O'Gorman & Young* v. *Hartford Insurance Co.*, 282 U.S. 251; *California State Automobile Association Inter-Insurance Bureau* v. *Maloney*, 341 U.S. 105; *Tumey* v. *Ohio*, 273 U.S. 510; *Hetrick* v. *Village of Lindsay*, 265 U.S. 384; cf. *Matthews* v. *Huwe*, 269 U.S. 262, 266. By deciding that this case presented no debatable constitutional question the Supreme Court of Ohio upheld the statutes as so construed and applied. *Fidelity & Deposit Co. of Maryland* v. *Tafoya*, 270 U. S. 426, 434; *Sterling* v. *Constantin*, 287 U.S. 378, 393-4; *Query* v. *United States*, 316 U.S. 486, 488-9.

Questions Presented

Where automobile dealers or their employes are licensed as insurance agents to sell motor vehicle physical damage and theft insurance and, in the normal course of their automobile business, use their licenses to sell insurance to their automobile purchasers, may a State, without violating the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution, revoke their insurance licenses solely because such insurance business constitutes the principal use of the agents'

licenses? Where the applicable Ohio statutes, as so interpreted and applied, have the effect of making it impossible for a person connected with an automobile dealership to receive and practically impossible for him to hold such a license, do the statutes violate either or both of those provisions of the Fourteenth Amendment? In particular, if the sole purpose of the Ohio statutes, as so interpreted and applied, is, as indicated by the Common Pleas Court, to deprive such licensees of a natural competitive advantage ("to prevent an unfair advantage"—see Appendix C) over other insurance agents not so situated, is that a valid public purpose—does it in any way further the interests of the insuring public? If the "unfair advantage" to which the Common Pleas Court referred is a supposed opportunity to engage in the *illegal* practice of tying-in the sale of insurance with the sale of an automobile, is the principal-use limitation rational in any respect as a means of eliminating, or even reducing, such illicit temptation and such illegal conduct? Do the Ohio statutes, as so interpreted and applied, work discriminations, invalid under the equal protection clause of the Fourteenth Amendment, (1) in favor of automobile dealer-insurance agents who by reason of previous establishment of an insurance clientele or otherwise find it practically possible from inception of their licensure to overmatch the numerical volume of insurance effected for their automobile purchasers by the volume of other insurance business, and against such automobile dealer-insurance agents whose situation does not present that practical possibility; (2) against automobile dealer-insurance agents and in favor of insurance agents engaged exclusively in the insurance business; and (3) against automobile dealer-insurance agents and in favor of those part-time insurance agents whose other occupation does not involve the retail sale of merchandise which, immediately upon sale, becomes a potential subject of separate insurance pro-

tecting the purchaser against loss or physical damage. Is the principal-use test of the Ohio statutes, as interpreted and applied, a rational line of demarcation between such classes?[4]

Statutes Involved

The statutes involved, the validity of whose interpretation and application is questioned, are Sections 644 and 644-3 of the General Code of Ohio.[5] The material portions[6] are:

> "Section 644. * * * Upon written notice by an insurance company authorized to transact business in this state of its appointment of a person to act as its agent the superintendent of insurance, if he is satisfied *that the appointee* is a suitable person and *intends to hold himself out* in good faith *as an agent:* that appointee is honest, trustworthy and understands the duties and obligations of an agent and is familiar with the insurance laws of the state and with the terms and provisions of the policies and contracts of insurance he proposes to effect; *that in applying for such license it is not appointee's purpose or intention principally to solicit or place insurance on* appointee's own *property* or that of relatives, employers or employees or that

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[4] All points raised in the Assignment of Errors are also presented. The questions presented, as stated above, set forth the major issues.

[5] There is no official edition of the General Code of Ohio. Section 644 appears on pages 407 and 408 of Page's Ohio General Code Annotated, Volume 1, and on page 70, Throckmorton's Ohio Code Annotated, Part First, Baldwin's 1948 Revision. Section 644-3 (as amended, effective August 12, 1949) appears on page 126 of the Cumulative Pocket Supplement, Volume 1, of Page's Ohio General Code Annotated, 1951, and on page 73 of Throckmorton's Ohio Code Annotated, Baldwin's Permanent Service 1948-1952.

[6] Underscored portions are particularly material to the construction issue raised by appellants in the State courts. Section 644 is quoted in full in the annexed opinion of the Common Pleas Court (Appendix C). Section 644-3 as quoted in that opinion is the version in force prior to August 12, 1949.

for which they or *the appointee is* agent, custodian, *vendor,* bailee, trustee or payee, shall issue to appointee a license * * * that the person named therein is a constituted agent of the company * * * for the transaction of such business as it is authorized to transact * * *. The superintendent of insurance, after the granting of such license, for cause shown, and after a hearing, may determine any persons so appointed or any person heretofore appointed * * * to be unsuitable to act as such agent, and shall thereupon revoke such license and notify both the company and the agent of such revocation. Unless revoked * * * or unless cancelled * * * on written notice from the company or the agent * * * such license * * * or any renewal thereof shall expire on the 30th of June next after its issue. * * *"

"Section 644-3. It shall be the duty of the superintendent of insurance to refuse to grant any licenses applied for, and to refuse to renew, and to revoke any license of or to any * * * agent, * * * when he is satisfied that *the principal use of such license has been or is * * * to solicit, place or effect * * * insurance directly or indirectly upon* or in connection with the *property* of such * * * agent * * * or that of relatives, employer, employees, or that *for which* they or *the * * * agent* * * * are or *is* agent, custodian, *vendor,* bailee, trustee or payee, or to evade or violate the provisions of Section 9589-1 of the General Code. * * *"

Statement of Case[7]

Appellant Motors Insurance Corporation is engaged solely in the business of insuring against physical damage to and theft of motor vehicles (par. 1). When this action was instituted it was conducting that business in Ohio as well as in 44 other jurisdictions through licensed agents

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[7] All references under this heading are to the petition for injunctive relief, to which the defendants-appellees demurred.

also connected with automobile dealerships (*id.*). Approximately 1100 such agents were licensed in Ohio over a period of time following the company's commencement of operations there in September 1948 (par. 3). Less than a year later, shortly after August 12, 1949, the Superintendent of Insurance sent questionnaires to these agents requiring them to list the insureds in all policies written by them and to state in how many instances the subjects of insurance (automobiles) had been sold by the agents or their employers (pars. 16 and 17 "b"). On the basis of the answers to these questionnaires (which showed that most of the policies insured persons to whom the agent had sold cars) and the Superintendent's interpretation of the principal use provisions of Sections 644 and 644-3, the Superintendent revoked the licenses of certain agents and, while statutory appeals in these cases were pending, refused to renew the annual licenses expiring June 30, 1950 of all but three of the other agents (par. 17). In addition, he refused to issue new licenses to appointees of Motors Insurance Corporation who were in anywise connected with automobile dealerships (pars. 17 "a" and 21). Accordingly, in view of the community of interests and inadequacy of statutory remedies this representative class action for an injunction was filed June 21, 1950 in the Common Pleas Court of Franklin County.

The defendants (appellees here) by demurring to the petition, admitted all well-pleaded facts. All of these agents meet the qualifying requirements for original issuance and renewal of licenses provided in Section 644; that is, all are suitable persons—they are honest, trustworthy, understand the duties and obligations of an agent and are familiar with the policies of insurance they propose to effect—and they have also held themselves out in good faith as insurance agents (pars. 2, 4, 5, 6).

Motors Insurance Corporation is fully qualified to do the described business in Ohio, and has complied with all of the Ohio laws (par. 2).

It is further admitted that a great many automobiles, as is well known, are sold under installment contracts that require insurance against loss of or damage to the car to protect the financing institution and the buyer (pars. 9, 10, 11); that these dealer-insurance agents had solicited and, at the option of their automobile customers, had placed such insurance for most of them (par. 11), and had also solicited and sold insurance to their cash purchasers of cars, to persons to whom cars had been sold by others and to persons in renewal of expiring policies (par. 12); that in no instance was the dealer-agent a party insured (par. 14); that the entire premium cost was borne solely by the car purchasers (par. 15); and that no car purchaser has been required to buy the insurance solicited by the agent as a condition of the purchase or of the financing of the car (par. 11).[8]

Facts susceptible of judicial notice include (1) the fact that an automobile, due to its mobility, is in a class by itself as a subject of insurance, because it cannot be covered by an ordinary household goods policy; (2) the immediate subjection of the car, upon delivery, to such peculiarly imminent risks as collision, fire and theft, and the many other risks covered by the standard automobile physical damage policy; (3) the fact that such insurance should, and in installment transactions must, be effective after sale immediately upon delivery; and (4) the fact that all such policies are written for limited periods (at least one year

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[8] Section 9589-5, Ohio General Code (found on p. 134 of the Cumulative Pocket Supplement, Volume VI, of Page's Ohio General Code, Annotated, 1951, and on p. 193 of Throckmorton's Ohio Code Annotated, Baldwin's Permanent Service 1948-1952) makes such conduct a criminal offense and requires immediate license revocation.

and for the duration of the installment contract, if any), although subject to renewal. Plainly the opportunity of convenient insurance service afforded by dealer-insurance agents to automobile buyers needing physical damage insurance is a public good and just as valuable to both sides of the transaction as that afforded, in a different field, by real estate agents who almost universally are also insurance agents. Plainly, also, this opportunity of service naturally yields insurance business to the dealer-agent which, at the outset of his licensed experience, is bound to make up the greater portion of his insurance placements.

The demurrer to the petition thus put in issue solely the correctness and constitutional validity of the Superintendent's construction and application of Sections 644 and 644-3 to these facts.

Appellants, on the basis of the internal logic of all the terms of these statutes, their legislative history, and their relation to other statutes *in pari materia*, contended that the true and only valid meaning of the statutory words "insurance • • • upon • • • property" is that they necessarily refer to insurance protecting *persons*[9] (the agent himself, his relatives, employer or employees—the only *persons* described in the statutes), and that the enumeration respecting property "for which" the insurance agent or his "relatives, employers or employes • • • is • • • agent, custodian, vendor", etc. obviously refers to various *continuing capacities* of such insured persons giving rise to their insurable interests in property.

On these premises they contended that the evil against which the provisions in question are aimed is the excessive ("principal") use of an insurance agent's license to obtain insurance for the agent himself at reduced cost by

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[9] There is no such thing as insurance "upon property". That expression is a common barbarism: Only *persons* are insured.

virtue of his commissions or to act as a purchasing broker for certain others in close personal or economic association with himself ("relatives, employers, employees"), in which event he would not be "holding himself out in good faith as an agent" (although such use, to a moderate extent, is permitted by Ohio law).

The Superintendent of Insurance, however, construed and applied the words "*upon* • • • *property* • • • *for which* • • • the appointee • • • *is* • • • *vendor*" as embodying a limitation upon the agent insuring *customers* of his other business in respect of property sold by him to them (par. 16). In other words, the quoted phrase was taken to refer to insurance covering the *vendee* of property which the agent *had sold* and "for which" he *had been* the vendor.

Appellants also contended that—whatever the restricted class of insured persons may be—the terms "principally" and "principal use" can only validly be interpreted as requiring the Superintendent of Insurance to exercise a reasonable discretion, taking into account, particularly in the case of newly licensed agents, their unsuccessful solicitations and—under the Superintendent's view as to what constitutes the restricted class—the prospects of annual renewal business and other business derived from insureds not in the category of vendees in contemporaneous transactions involving the sale of automobiles. However, the Superintendent applied "principally" and "principal use" as requiring denial of licensure, if, on the basis of merely an arithmetical count, a majority of policies were issued during a given period of time to persons in what the Superintendent conceived to be the restricted class (automobile buyers) and considered that such arithmetical count could be taken, as here, after the lapse of an unreasonably short period of time from inception of licensure. In the case of new automobile dealer-applicants, the Superintendent assumed, not unreasonably, that such persons would,

if licensed, effect a majority of policies in the supposed restricted class—at least during the first license year—and he therefore refused to issue first-time licenses to such persons.

It is obvious that the restrictive force of the Superintendent's construction and application not only practically prevents the ordinary dealer-agent who has held a license for a limited time from continuing in license (pars. 7, 17); but now that the Superintendent has taken his position with respect to new applicants, prohibits the initial licensure of any automobile dealers as insurance agents (pars. 17 "a" and 21). A newly licensed dealer-agent normally begins business without any backlog of insurance renewals or any clientele of prospects other than his automobile purchasers. Under the Superintendent's construction the dealer-agent is practically deprived of his most natural opportunity even to get started. At once confronted with the opportunity of serving his car purchasers (most of whom, being "time" buyers, are required to have insurance) by soliciting them to purchase insurance from him, he would have to forego many such opportunities until he had gone out of his way and matched that type of insurance business with new business which would not normally come his way, until his insurance production record—whatever its volume—was in "proper" balance percentagewise. Thus, even if the average newly licensed automobile-dealer-agent were able to develop an "outside" insurance clientele, he would have to say at various times to many a car purchaser insurance prospect: "I'm sorry. I can't offer you this insurance. You'll have to go elsewhere for it. Yesterday I could have sold it to you. Tomorrow I might be able to—but unfortunately you need it, of course, right away."

The State courts having sustained appellees' contentions, their construction and application of the statutes must

necessarily be accepted as binding upon the United States Supreme Court.

The Questions Are Substantial

The questions presented are not only novel and of great importance to the automobile insuring public but are substantial.[10]

The restrictive force of the Superintendent's construction and application operates exclusively to the distinct advantage of competing insurance agents not connected with automobile dealerships by depriving dealer-agents of a natural competitive advantage without the saving grace of serving also to benefit the insuring public in any way; indeed, it operates to the distinct disservice of that public. In the words of the Common Pleas Court—whose opinion is the only one which contains any discussion of the statutes:

> "The purpose of the restriction was undoubtedly intended to prevent an unfair advantage in the placing of insurance and the licensing of persons who were not intending to do a general insurance business, but simply to supplement their primary business of selling automobiles."
>
> "* * * the restrictions with respect to insurance on property of which the licensee or his employer is the vendor applies [sic] to the time the sale is consummated, and the licensee is in an especially advantageous position to place the insurance."

The court thus considered "unfair" the competitive advantage of a dealer-insurance agent. This advantage however is natural and legitimate, and is expressly recognized as such not only by Sections 644 and 644-3 themselves but

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[10] Although the Ohio Supreme Court held that no "debatable constitutional question" was involved, it will be observed that three of the seven members of that court did not concur in this conclusion, although, in fact, all members participated in the consideration of the case.

by two recently enacted Ohio statutes: the Retail Installment Sales Act [11] and the law against tying in insurance with the sale of a commodity.[12] Thus, the Ohio statutes, unlike the statute involved in *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, expressly sanction, rather than forbid, the contemporaneous conduct of two businesses, here, the automobile sales and automobile insurance businesses. Cf. *Hauser* v. *North British Mercantile Insurance Co.*, 206 N.Y. 455, 100 N.E. 52, 53-4. In this connection, the Common Pleas Court, proceeding from its erroneous conception of the holding in the *Daniel* case, suggested that the Ohio legislature might also "in theory if not in fact" have intended to curb "monopoly" by insurance *companies* of "all kinds of insurance involving automobiles" [13]—a wholly irrational afterthought exposed

[11] Sections 6346-17 to 6346-27, found on pp. 157-161 of the 1951 Supplement to Page's Ohio General Code Annotated and on pp. 93 to 96 of Throckmorton's Ohio Code, Annotated, Baldwin's Permanent Service, 1948-1952. Sec. 6346-19 provides in part that: "• • • No provision of this act shall be construed to authorize anyone other than a licensee of the division of insurance to directly or indirectly receive any part of the amount charged for insurance in connection with any retail installment sale". Sec. 6346-22 provides in part: "• • • Provided, further, that any compensation received by the retail seller as commission received by him from an insurance company as its licensed agent, shall not be deemed or construed as a benefit received by the retail seller out of the insurance charge to the retail buyer under the installment contract. • • •"

[12] Section 9589-5, referred to in note 8, *supra*, forbids any dealer or finance company to make the taking of insurance in a particular company or from a particular agent a condition precedent to the sale or financing of property. Besides providing criminal penalties, it requires the Superintendent of Insurance to "revoke the insurance license of any • • • agent • • • who violates" it.

[13] The recognized public evil involved in the statute upheld in the *Daniel* case was "the beneficiary's tendency to deliver the policy's proceeds to the agent-undertaker for whatever funeral the money will buy, whether or not an expensive ceremony is consistent with the needs of the survivors" (336 U.S. 220, pp. 222-3). This evil did not flow from any "advantageous position" of the undertaker *qua* insurance agent "to effect such insurance", nor was the case concerned with "monopoly" of insurance.

by the very framework of Sections 644 and 644-3 themselves, as well as by the total irrelevancy of the *principal use* limitation to the question of actual or potential use of any means, legal or illegal, to achieve a "monopoly" in the sale of insurance for the agent's company. If, for example, the Common Pleas Court means to imply that such a "monopoly" might be achieved illegally by means of "tie-in" devices, the principal use test of the statutes is obviously neither a cure nor a preventive of such conduct. Moreover, the language in question first appeared in the statute (Sec. 644) in 1935 (see 116 O.L. 240) when, as is well known, there was no scarcity of automobiles which could afford an opportunity for "tie-in" practices. Indeed, the statutes do not so much as mention "automobiles". Finally, in Ohio people are not licensed "to do a general insurance business"; under Section 644 they are licensed to represent a company only "for the transaction of such business as it is authorized to transact".

Due Process of Law

Appellants fully appreciate the heavy burden resting "upon one who would persuade * * * [the United States Supreme Court] to use the due process clause to strike down a substantive law". They recognize that the police power " 'extends to all the great public needs' " and that its utilization "in aid of what the legislative judgment deems necessary to the public welfare * * * is peculiarly apt when the business of insurance is involved—a business to which the government has long had a 'special relation' ", "State regulation of the insurance business * * * [having been] upheld in a wide variety of circumstances against the claim that the law violated * * * Due Process * * *". *California State Automobile Ass'n., etc.* v. *Maloney*, 341 U.S. 105, 109; and see *Daniel* v. *Family Security Life In-*

surance Co., 336 U.S. 220, 224-5 (footnote). They are fully cognizant of the "pronounced shift of emphasis" (*id.* at p. 225), evidenced by *Nebbia* v. *New York*, 291 U.S. 502, which has occurred in due process philosophy concerning a state's legislative efforts in the "public welfare" to remove "injurious practices in their internal commercial and business affairs". *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 536. They appreciate the force of the Court's statement in *Breard* v. *Alexandria*, 341 U. S. 622 (at pp. 632-3) that:

> "• • • even a legitimate occupation may be restricted or prohibited in the public interest. See the dissent in *New State Ice Co.* v. *Liebmann*, 285 U.S. 262, 280, 303. The problem is legislative where there are reasonable bases for legislative action."

Nor do appellants question the well-established presumption of constitutionality of statutes.

But—appellants are here asking the Court to strike down a construction and application that leaves nothing to imagination and presumption; that frankly subverts Sections 644 and 644-3 of the Ohio General Code to the promotion solely of private competitive, as distinguished from public, purposes and to the preferment of the economic interests of one group to those of another; that harms the interests of the automobile insuring public without striking at any public evil or tendency toward evil; and that reduces the statutory means (the principal use limitation) to an inherently irrational absurdity considered as a device "to prevent an unfair advantage in the placing of insurance and the licensing of persons who were not intending to do a general insurance business, but simply to supplement their primary business of selling automobiles". The "pronounced shift of emphasis" does not touch these abiding deficiencies which are clearly recognized as such in all cases.

In many earlier decisions the Supreme Court of the United States has held unconstitutional under the due process clause state action which accomplishes an invasion of an individual's right to pursue a lawful business and which favors solely his entrenched competitors without being referable to any public evil. See e.g., *Butcher's Union Slaughter-house, etc.* v. *Crescent City Live-stock, etc. Co.*, 111 U.S. 746; *Liggett Co.* v. *Baldridge*, 278 U.S. 105 (and dissenting opinion of Mr. Justice Holmes at pp. 114-117); *Smith* v. *Texas*, 233 U.S. 630; *Fidelity & Deposit Co. of Maryland* v. *Tafoya*, 270 U.S. 426; *Treigle* v. *Acme Homestead Ass'n.*, 297 U.S. 189; *Northwestern National Insurance Co.* v. *Lee*, 49 F. (2d) 274 (aff'd. *sub nom.*, *Averill* v. *Northwestern National Insurance Co.*, 284 U.S. 590). Cf. *Lawton* v. *Steele*, 152 U.S. 133, 136-7. And see *Hauser* v. *North British Mercantile Insurance Co.*, 206 N.Y. 455, 100 N.E. 52; *Northwestern National Insurance Co.* v. *Fishback*, 130 Wash. 490, 228 Pac. 516.

In all recent cases in which the due process clause has been invoked, the statutes were patently aimed at clear-cut public evils, plainly discernible from the statutes themselves and so acknowledged and described in the opinions. The Court found that the state legislatures' judgments regarding the existence of such public evils were not unwarranted and that the legislative means were rationally related to their elimination or reduction. See e.g. *Lincoln Federal Labor Union* v. *Northwestern Iron & Metal Co.*, 335 U.S. 525, 534; *Railway Express Agency Co.* v. *New York*, 336 U.S. 106, 109, 110; *Daniel* v. *Family Security Life Insurance Co.*, 336 U.S. 220, 222-224, and *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 547-551.

In this case the construction and application sanctioned by the Ohio courts is so restrictive under the circumstances as practically to exclude automobile dealers from licensure

as insurance agents, and *that*, rather than the words of the statutes (which are fair enough on their face) is what appellants conceive to be a denial of due process of law. But as has been shown, other Ohio statutes plainly recognize the propriety of a seller of goods being licensed as an insurance agent, and placing insurance on the goods sold; so that it can not be said that the result of the decisions appealed from cures or obviates something of which the legislature must have conceived as an evil. Neither in fact nor by assumption can the construction and application of the statutes herein questioned be justified as an exercise of legislative judgment concerning any objective whatsoever other than the preference of one group of competitors over another.

In many cases decided under the Commerce Clause state licensing statutes which discriminate against non-residents solely for the benefit of their local competitors have been declared void. Such considerations of favoritism are unlawful by whatever standard judged. See e.g. *Best & Co.* v. *Maxwell*, 311 U.S. 454, 456-7; *Nippert* v. *City of Richmond*, 327 U. S. 416, 433-4 (footnote). As stated by the Chief Justice, dissenting in *Breard* v. *Alexandria*, 341 U.S. 622 (at p. 647):

> "In passing upon other ordinances affecting solicitors, this Court has not hesitated in noting the economic fact that 'the "real competitors" of [solicitors] are, among others, the local retail merchants.' "

See also, *Pennsylvania* v. *West Virginia*, 262 U.S. 553; *Buck* v. *Kuykendall*, 267 U.S. 307, 315-6; *Baldwin* v. *Seelig*, 294 U.S. 511; and *Hood & Sons* v. *DuMond*, 336 U.S. 525.

Even if some undisclosed public purpose could be assumed in support of the construction and application of the phrase "upon * * * property * * * for which * * * the appointee * * * is * * * vendor" as referring to insurance

covering the dealer-agent's car purchasers, the manner in which the Superintendent applies—and is authorized by the decisions below to apply—the principal use standard is so irrational, capricious and arbitrary as to condemn it because violative of both the due process and equal protection principles. In other words, whatever the type of business contemplated by the quoted phrase, the Superintendent's method of applying the principal use standard is arbitrary and capricious as well as irrational as a means "to prevent an unfair advantage". By thus misconceiving the true identity of the restricted class of business and by his arbitrary application of the principal use standard, the practical result of the Superintendent's action is doubly harsh.

The Superintendent takes the agent's "production record" listing policies effected through him during some arbitrarily selected period of time and showing those issued to the dealer-agent's car purchasers and those issued to others. (Unsuccessful solicitations are not counted.) If the former outnumber the latter, the agent's license is revoked or not renewed. (And since the anticipated production of a dealer-applicant for a first-time license is believed likely to show such an excess, licensure is refused.)

The purely mathematical result of such a count thus depends upon the period covered by the record, irrespective of whether or not that period is of sufficient length for the adequate demonstration of any properly proscribed principal use and discretionary assessment of probable future conduct. And assuming the proscribed class of business to be that of the dealer-agent's car purchasers and the purpose of the restriction to be the prevention of "an unfair advantage in the placing of insurance" at a time when the agent is "in an especially advantageous position to place the insurance", what rational relationship is there between

the principal use means and the prevention of any such advantage, fair or unfair? The gist of the challenged construction is that it *compels* successful solicitation of a preponderant quantum of "outside" business as a condition of doing the "inside" business; it does not prohibit or even regulate the "inside" business.

The arbitrary nature of the restriction as applied by the Superintendent affects a whole class—automobile dealers and their employes—and is not merely burdensome in isolated instances. Its effect is to destroy a business opportunity of benefit to the insuring public as well as to automobile dealers without preventing or reducing any public evil.

Equal Protection of the Law

The Superintendent's construction and application of the statutes likewise violates the equal protection principle. It is fundamental that a State may discriminate in its police regulations only where the discrimination is based upon a reasonable classification. To be reasonable the differentiation must, pragmatically, be "fairly related to the object of regulation" (*Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110, 112): It "must be based upon some real and substantial distinction, bearing a reasonable and just relation to the things in respect of which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis". *Southern Railway Co.* v. *Greene*, 216 U. S. 400, 417. As stated in *Patsone* v. *Pennsylvania*, 232 U. S. 138, 144 (per Mr. Justice Holmes): "The question is a practical one dependent upon experience."

Here, the admitted practical effect of the Ohio statutes, as construed and applied, is, first, to create an occupational class against which there is discrimination. Automobile dealers and their employes are denied insurance licenses on

a ground related solely to their "primary business of selling automobiles", as well as by means of a test which almost inevitably excludes them on that ground. As a practical matter the class is closed. This practical exclusion is accomplished by a classification which has no reasonable or rational relationship to any legitimate purpose of the licensing laws. The pretext for it given in the opinion of the Common Pleas Court (that at "the time the [car] sale is consummated" the automobile dealer-agent is in "an especially advantageous position to place the insurance" and thereby enjoys "an unfair advantage") is not a legitimate public purpose, and even if it were, the principal-use test is obviously wholly irrational as a means to "prevent" any such "unfair advantage in the placing of insurance."

A further unwarranted discrimination which is a practical consequence of the Superintendent's construction and application of the statutes and of his conception of what constitutes the restricted class of business, is the discrimination thereby made in favor of dealer-agents who, for any reason, such as a sufficient prior engagement in the insurance business and consequent possession of an insurance clientele, would find it practicable to overmatch the business done with their car purchasers by that done with others. The petition states that three of the licensed agents of Motors Insurance Corporation are in such a preferred class (pars. 7 and 17). This circumstance dramatically exposes the arbitrary impact of the statutes, as construed and applied, and the lack of any rational or reasonable relation of the resulting classifications to any discernible public purpose of a licensing law. Were a dealer-agent successful in selling insurance to every one of his automobile purchasers, yet had sold a larger number of policies to his "outside" clientele, he would not run afoul of the law as so construed. The relatively small dealer selling only 100 new cars a year but insuring each of the purchasers or a ma-

jority thereof, would be in violation of the statutes as construed whereas a large dealer selling 1,000 cars annually who sold insurance to many of his car purchasers yet sold more insurance to his "outside" clientele would not be in violation of the statutes as construed. Thus, the agent's production record is a wholly irrational criterion for fixing the line of demarcation between the class of dealer-agents that possesses a so-called "unfair advantage in the placing of insurance" and the class of dealer-agents which supposedly is not so advantageously situated: By definition, the "especially advantageous position to place the insurance" exists on both sides of the line at all times. It exists just as much in a single transaction involving the sale of automobile insurance to a dealer-agent's car customer as it does in any number or percentage of such transactions. Cf. *Engel* v. *O'Malley*, 219 U.S. 128, 137-8 (Mr. Justice Holmes: " • • • where size is not an index to an admitted evil the law cannot discriminate between the great and small"). If it be argued that the Common Pleas Court does not equate "an especially advantageous position to place the insurance" with "an unfair advantage in the placing of insurance," but that the advantage only becomes "unfair" when the business derived from such solicitation constitutes the principal use of the dealer-agent's license, what process of reasoning can account for this qualitative change from fairness to unfairness? "Unfair" to whom? Agents not so advantageously situated are the only conceivable beneficiaries of such a concept of "unfairness."

Conclusion

The questions of due process of law and equal protection of the laws may be summarized thus:

Does State action, under color of a State statute, which, by reason of admitted and known facts concerning (1) the manner in which and the circumstances under which auto-

mobiles are sold and their purchasers are insured against physical damage to and loss of the vehicle, and (2) the manner in which an insurance clientele is built up, denies to automobile dealers the right, open to others, of being licensed and acting as agents of a company writing such insurance, deprive them of their property and liberty without due process of law, or deny to them the equal protection of the laws, or both?

Even assuming that the average automobile dealer, if newly licensed as an insurance agent, could develop an "outside" insurance clientele soon after becoming licensed, what benefit to the insuring public could be served by requiring him to abstain from attempting to sell insurance to one purchaser of a car from him until, as insurance agent, he had first sold insurance to another person not in that class—both purchaser and agent meanwhile losing the benefit of the insurance transaction? Does such a restriction, even if surmountable, deprive automobile dealers of property and liberty without due process of law, or deny to them the equal protection of the laws, or both?

It is respectfully submitted that the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the Supreme Court of Ohio and decide these important and substantial questions.

Respectfully submitted,

CLARENCE D. LAYLIN,
J. RATH CRABBE,
Attorneys for Motors Insurance Corporation, The Avondale Motor Car Company and John L. Cashman, Appellants.

Dated: July 1, 1952.

EAGLESON & LAYLIN,
BALLARD, DRESBACH & CRABBE,
Of Counsel.

APPENDIX A

Motors Ins. Corp. et al., Appellants v. Robinson, Supt., et al., Appellees. (No. 32938—Decided March 19, 1952.) Appeal from the Court of Appeals for Franklin County.

Messrs. Eagleson & Laylin and Messrs. Ballard, Dresbach & Crabbe, for appellants.

Mr. C. William O'Neill, attorney general, Mr. Ralph Klapp & Crabbe, for appellants.

Mr. C. William O'Neill, attorney general, Mr. Ralph Klapp and Mr. Don W. Montgomery, for appellees.

It is ordered and adjudged that this appeal as of right be, and the same hereby is, dismissed for the reason that no debatable constitutional question is involved.

Appeal dismissed.

Weygandt, C.J., Zimmerman, Middleton, and Matthias, JJ., concur.

APPENDIX B

IN THE COURT OF APPEALS OF FRANKLIN COUNTY, OHIO

No. 4614

MOTORS INSURANCE CORPORATION, et al., *Plaintiffs-Appellants,*

vs.

WALTER A. ROBINSON, as Superintendent of Insurance of Ohio, et al., *Defendants-Appellees*

Opinion

Rendered on the 23rd day of October, 1951

Messrs. Eagleson & Laylin, 16 East Broad Street, Columbus 15, Ohio,

Messrs. Ballard, Dresbach & Crabbe, 8 East Broad Street, Columbus 15, Ohio, for Plaintiffs-Appellants.

Hon. C. William O'Neill, Attorney General; Mr. Ralph Klapp, Assistant Attorney General; State House Annex, Columbus 15, Ohio, for Defendants-Appellees.

By the COURT:

This is a law appeal from the judgment of the Common Pleas Court construing General Code Sections 644 and 644-3 and also holding that the same is not in violation of Article I, Section 2 of the Constitution of Ohio, and of the Fourteenth Amendment to the Constitution of the United States.

We have examined the well-considered opinion of Judge Reynolds and are in accord with the logic and legal conclusions contained therein.

Finding no error in the record, the judgment will be affirmed.

Hornbeck, P.J., Wiseman and Miller, JJ., concur.

APPENDIX C

COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO

No. 180,447

MOTORS INSURANCE CORPORATION, et al., *Plaintiffs*,

vs.

WALTER A. ROBINSON, Supt. of Insurance, et al., *Defendants*

Decision

Rendered this 22nd Day of March, 1951

REYNOLDS, *J.*:

This case is before the court on defendants' demurrer to plaintiffs' petition.

In this action plaintiffs seek to enjoin defendants from refusing to grant insurance agents licenses to persons nominated by Motors Insurance Corporation or from re-

fusing to admit such persons to examinations to determine their qualifications to be licensed as insurance agents or from refusing to renew insurance agents licenses held by the individual plaintiffs and those whom they represent, or from revoking licenses upon the ground that the principal use of such licenses has been, is, or will be to procure insurance covering solely the interests of persons, firms or corporations other than such licensees or their employes or employers in motor vehicles which such licensees or their employer, or employers, have sold or are selling.

The petition recites that Motors Insurance Corporation is a corporation, under the laws of the State of New York and engaged in the business of insuring against the risks of physical damage to and theft of motor vehicles, and is conducting said business in the State of Ohio, among other places through licensed agents, who in the main are connected with the business of motor vehicle sales; that it has complied with all the laws of Ohio relative to foreign insurance companies, other than life, engaged in business of the kind herein described; that it was authorized to transact such business in Ohio by a certificate of authority issued to it by the Division of Insurance, Department of Commerce of the State of Ohio on May 9, 1940, which certificate has been renewed annually; that pursuant to such certificate Motors Insurance Corporation has transacted such insurance business in Ohio since September 1948, as of which date agents appointed by it, were first licensed as insurance agents by said Division of Insurance, acting through the then Superintendent of Insurance of Ohio; that since said date 935 individuals and 247 corporations have been appointed by said Motors Insurance Corporation and licensed by said Division of Insurance as agents of said corporation in Ohio, and at the present time there are approximately 912 such individual agents and that all of said corporations and approximately 863 such individuals are either motor vehicle dealers or officers or employes of such dealers and are doing business in approximately 454 different locations in Ohio; that the remaining agents are employes of plaintiffs' branch offices in Ohio whose duties are substantially limited to receiving and forwarding appli-

cations procured by other licensed agents, and that all of said agents have met all the qualifying requirements for the issuance and renewal of licenses to act as insurance agents as provided by Sec. 644 of the General Code of Ohio; that plaintiff, The Avondale Motor Car Company, is a corporation under Ohio laws, with its principal place of business in Cincinnati, and is a dealer in motor vehicles, and is also licensed to procure applications for insurance in Ohio, as agent of Motors Insurance Corporation, pursuant to license issued in September, 1948, by the Superintendent of Insurance, on the requisition of said Motors Insurance Corporation, which license was renewed on July, 1949, and is now in full force and effect; that plaintiff, Fred Kahn, is engaged in business as a dealer in motor vehicles, at Lebanon, Ohio, and holds a license issued by the State of Ohio, to procure insurance as agent of plaintiff; that plaintiff John L. Cashman is an employe of The Winders Chevrolet Company, an Ohio corporation, with its principal place of business in Columbus, where it is engaged in the business of dealing in motor vehicles, and that the said Cashman holds a license to procure applications of insurance as agent of Motors Insurance Corporation, pursuant to a license issued by the State of Ohio on the requisition of Motors Insurance Company, which said license is in full force and effect; that plaintiffs bring the action on behalf of themselves and the representatives of the class above described, who are similarly situated and who would be similarly affected by the threatened actions complained of, and that there is a community of interest among the plaintiffs and the other said representatives of Motors Insurance Corporation above referred to; that defendant Walter Robinson is the duly qualified and acting head of the Division of Insurance within the Department of Commerce of the State of Ohio, with the title of Superintendent of Insurance; that defendant Robert L. Moulton is the duly appointed and qualified Director of Commerce of the State of Ohio, and as such, authorized to exercise the powers vested by the laws of Ohio in said department, including all powers invested in the office of the Superintendent of Insurance; that the actions

and threatened actions of which complaint is made herein have been and presumably will be taken and done in the name of the Superintendent of Insurance by defendant Walter A. Robinson under the authorization and with the approval of defendant Robert L. Moulton; that a very considerable proportion of the sales of motor vehicles by practically all dealers in the State of Ohio are transactions in which payment of the larger part of the purchase price is made in deferred installments. Generally, however, the dealer is not equipped to handle these transactions himself and must arrange for the financing thereof with some financial institution or institutions which generally require either a legal lien upon or a legal interest in the vehicle and insurance against physical damage and theft of the vehicle; that in case of deferred payments the cost of insurance is added, a chattel mortgage is given to the seller to secure the payments, and this is assigned to the institution financing the transaction, and the insurance premium is paid by it to the insurer; that the agents of plaintiff Motors Insurance Corporation, solicit and place the insurance incidental to such sales, but may not make the placement of such insurance with the said Motors Insurance Corporation a condition of such sales or such financing, an option of procuring such insurance through an agent and in a company of the purchaser's choice being given each purchaser, *but in most cases purchasers have elected to insure with said Motors Insurance Corporation.* (Italics ours.)

In addition to the above described insurance placed by plaintiffs' agents, they also placed damage and theft insurance on vehicles sold for cash by the dealer with whom or which the agent is connected; on vehicles not sold by the dealer with whom the agent is connected, and on renewal policies on vehicles whether or not originally sold by the dealer with whom the agent is connected; that the insurance so written covers only the retail purchaser or owner but subject to any known lien or interest; that in no instance has any agent placed any insurance on vehicles owned by such agent or his employer, and the entire premium cost is borne solely by the retail purchaser or owner;

that defendants have determined that if a majority or some other substantial number of policies of insurance placed in Ohio pursuant to a license issued under Sec. 644 G. C. by a person engaged in Ohio in the motor vehicle sales business cover motor vehicles which had been sold by such person or his or its employer or employes, then it is the duty of the Superintendent of Insurance to revoke or to refuse to grant or to refuse to renew such license, even though none of such policies has insured or would insure any interest of such person or employer as seller, and even though the entire premium cost of such insurance is or would be borne solely by the retail purchaser or owner of the motor vehicle.

The petition further alleges that defendants' interpretation of the statute involved, to-wit: G. C. 644-3 and related statutes, is incorrect, and that the practical effect of their enforcement as interpreted by defendants would be to destroy the insurance business of plaintiff in Ohio and would exclude persons connected with the business of selling motor vehicles from engaging in such insurance business in Ohio; and that unless enjoined, defendants will revoke existing licenses and refuse to renew or issue new licenses to agents representing plaintiffs, and which acts are and would be unconstitutional and result in irreparable loss.

The prayer of the petition is that defendants be enjoined from enforcing Sections 644 and 644-3 of the General Code of Ohio as thus interpreted, to-wit: from refusing to grant insurance licenses to persons otherwise qualified on the nomination of Motors Insurance Corporation, or from refusing to admit such persons to examinations to determine their qualifications to be licensed as insurance agents, or from refusing to renew licenses held by plaintiffs and those whom they represent, or from revoking such licenses, upon the sole ground that the principal use of such licenses has been or is or will be to procure, receive, forward, solicit, place or effect insurance covering solely the interests of persons, firms or corporations other than such licensees or their employes or employers on motor vehicles which such licensees or their employes or employers have sold or are selling.

Defendants filed a demurrer to the petition on the ground that it does not state facts sufficient to show a case of action and the case is now before this court on said demurrer.

The case has been argued at length and both sides have filed extensive briefs which the Court has read and re-read before coming to a conclusion on the questions involved, which in substance are these, namely, Do sections 644 and 644-3 of the General Code of Ohio inhibit the licensing of the persons by whom and on whose behalf this action is brought, and if so, are the statutory provisions invalid as being violative of the constitutional provisions of the State of Ohio and the United States.

The statutes in question are G.C. Secs. 644 and 644-3 which provide as follows:

"644. Agent's license issued, when; notice of appointment; contents, revocation or cancellation of license; renewal; review; exceptions.

"No person shall procure, receive, or forward applications for insurance unless a resident of this state and duly licensed by the superintendent of insurance. Upon written notice by an insurance company authorized to transact business in this state of its appointment of a person to act as its agent the superintendent of insurance, if he is satisfied that the appointee is a suitable person and intends to hold himself out in good faith as an agent; that appointee is honest, trustworthy and understands the duties and obligations of an agent and is familiar with the insurance laws of the state and with the terms and provisions of the policies and contracts of insurance he proposes to effect; that in applying for such license it is not appointee's purpose or intention principally to solicit or place insurance on appointee's own property or that of relatives, employers or employees or that for which they or the appointee is agent, custodian, vendor, bailee, trustee or payee, shall issue to appointee a license which shall state in substance that the company is authorized to do business in this state and that the person named therein is a constituted agent of the company in this state for the transaction of such

business as it is authorized to transact therein. Such appointee, if he has not theretofore held a license as an insurance agent in this state, shall be required to submit to a hearing and examination as to the above qualifications. Such notice by an insurance company of its appointment of an agent shall be upon a form furnished by the superintendent of insurance and shall be accompanied by a statement under oath by the appointee which shall give appointee's name, age, residence, present occupation, occupation for the five years next preceding the date of the notice and such other information, if any, as the superintendent of insurance may require, upon a blank furnished by him. Such examination and hearing shall be held and decision rendered by the superintendent of insurance within thirty days from date of application for license. The superintendent of insurance, after the granting of such license, for cause shown, and after a hearing, may determine any persons to be appointed, or any person heretofore appointed as agent to be unsuitable to act as such agent, and shall thereupon revoke such license, and notify both the company and the agent of such revocation. Unless revoked by the superintendent of insurance or unless cancelled by him on written notice from the company or the agent that the agent's authority to act for the company has been terminated by the company, such license and any other license issued to an agent or any renewal thereof shall expire on the 30th day of June next after its issue. But any license issued and in force when this act takes effect or thereafter issued, may, in the discretion of the superintendent, be renewed for a succeeding year or years by a renewal certificate without the superintendent's requiring the detailed information required by this act. A foreign or alien insurance company shall pay a fee of two dollars for every such license and for each renewal thereof.

The action of the superintendent of insurance in granting, revoking, renewing or refusing to grant, revoke or renew such license shall be subject to review

in accordance with the provisions of the administrative procedure act.

An insurance company shall be bound by the acts of the person named in the license within his apparent authority as its agent.

This section shall not apply to life insurance companies, including fraternals nor to domestic mutual protective assessment fire associations as defined in section 9593 of the General Code nor effect the provisions of section 644-2 thereof."

"644-3—When license shall be refused or revoked.—It shall be the duty of the superintendent of insurance to withhold any license applied for or revoke any license to any agent, solicitor or broker when he is satisfied that the principal use of such license is to effect insurance upon the property of such agent, broker or solicitor, or to evade or violate the provisions of section 9589-1."

Counsel for plaintiffs argue at length about the ambiguities and grammatical faults of these sections, as a result of which the intention of the legislature is at best difficult to determine, but that in the last analysis the conclusion as to the legislative intent is that it was to prevent the obtaining of insurance at discriminatory rates.

As supporting this theory, a comprehensive history of the various legislative enactments governing the insurance business is indulged to indicate a continued and consistent purpose to prohibit rebating and otherwise discriminatory practices in connection with insurance premiums.

The State of Ohio first began to supervise and regulate the insurance business in this state when it organized a separate department and provided for a Superintendent of Insurance and made it unlawful for any person or company to engage in the insurance business unless licensed by the said superintendent.

In 1910 the legislature enacted what is substantially now G. C. 9589-1 which prohibited rebates or other special favors as an inducement to secure insurance.

In the case of State v. Conn, 110 O. S. 405, the Supreme Court stated that

> "the purpose of the fire insurance act (G. C. Sec. 9589-1) was to prevent discrimination as to rates directly or indirectly by the insurer between its insured, and that it has not for one of its purposes the prevention of competition between insurance companies as to the rate which each may charge."

In 1917 the Legislature amended 644 and also enacted G. C. 644-1, 644-2, 644-3 and 644-4.

G. C. 644-3 provided for the revocation or withholding of a license by the Supterintendent of Insurance when he is satisfied that the principal use of such license was to effect insurance upon the property of the licensee or applicant for a license.

The purpose of this statute would appear to be that licenses shall not be granted to persons who were not intending to use the same for the general insurance business, but rather for their own individual benefit, since by the provisions of G. C. 9589-1, a duly authorized agent was entitled to the regular commission on policies of insurance on his own property, the insurance covering which he himself effected.

The following is the wording of G. C. 644-3 as originally enacted in 1917:

> "Section 644-3. It shall be the duty of the superintendent of insurance to withhold any license applied for, or revoke any license to any agent, solicitor, or broker when he is satisfied that the principal use of such license is to effect insurance upon the property of such agent, broker or solicitor, or to evade or violate the provisions of Section 9589-1 of the General Code."

The statute remained in this form until amended in 1949 and which amended statute has been heretofore set forth.

While the amendment is perhaps needlessly verbose and should not be held up as an example of the best English or grammatical perfection, yet it seems clear that the legislature intended to add to the reason for refusing to grant or

renew licenses or for revoking one already issued, that the principal use was to effect insurance upon the property of the licensee, the further provisions that the principal use also included property of relatives, employers, employees, or the property for which the licensee, relatives, employers or employees, is or are agent, custodian, vendor, bailee, trustee or payee.

It is the contention of plaintiffs that even should the statute be construed most unfavorably to them, that the restriction as to the insurance involving property for which certain named persons are vendors, that it could refer only to the time that the named persons held the property either actually or theoretically and that as soon as the property was sold and the property belonged to the purchaser, the restriction no longer applies.

In other words it is desired to construe the restrictive provisions of the statute as relating to insurable interests of the licensees, their relatives, employers, etc.

If this had been the intention of the legislature a great deal of trouble was indulged to express a simple purpose, and which could have been simply and directly stated.

Nor can the Court agree that the primary purpose of the legislative enactment was to further lessen the chances of rebating or the affording of unfair advantages to persons insured, and to accomplish this the legislature was narrowing still further the field of activity of the licensee.

In view of the provisions of G. C. Sec. 9589-1 which specifically prohibits rebating or other special favors or inducements to secure insurance, and provides for the revocation of licenses in cases of violations, the query naturally arises why there should be any necessity for a statutory provision curtailing an agent's activities for fear of his violating this statute.

The absolute guaranty that there would be no violation of Sec. 9589-1, would be, of course, to inhibit the licensee from writing any insurance, which of course leads to an absolute absurdity, toward which the suggested legislative purpose is at least a small step.

Prior to 1935 about the only conditions precedent to the granting of a license to a person affording him the right

to act as an insurance agent were that some insurance company authorized to transact business in this state give a written notice to the superintendent of Insurance of appointment of such person as agent, and the superintendent be satisfied that the appointee is a suitable person and intends to hold himself out in good faith as an agent.

In 1935 G. C. 644 was amended, setting out the further conditions, that before the Superintendent should issue a license that he should be satisfied *that the appointee "is honest, trustworthy and understands the duties and obligations of an agent and is familiar with the insurance laws of the state and with the terms and provisions of the policies and contracts of insurance he proposes to effect; that in applying for such license it is not appointee's purpose or intention principally to solicit or place insurance on appointee's own property or that of relatives, employers or employes or that for which they or the appointee is agent, custodian, vendor, bailee, trustee or payee.*" (Italics ours.)

Subsequent to this enactment the interpretation placed on the added conditions precedent to the issuing of licenses, was that they precluded automobile salesmen since presumably they would use their licenses to insure automobiles sold and being sold by their employers.

In the case of Motors Insurance Corporation vs. Dressel, 80 Oh. App. 505, decided in our own Court of Appeals, the Court held that the Superintendent of Insurance could not add to the qualifications or conditions for an insurance agent's license and that automobile salesmen could not be denied licenses simply for that reason.

This case affirmed the decision of Judge Leach in this court and in the case of Automobile Insurance Agency v. Lloyd, 36 O. L. A. 448, the same judge held that where the applicants had the qualifications set out in G. C. 644 and

> "Intend to hold themselves out in good faith as insurance agents * * * there is nothing to show that it is their purpose and intention principally to solicit or place insurance on their own property or that of relatives, employers or employees, or that for which they or the appointee is agent, custodian, vendor, bailee, trustee or payee,"

they were entitled to be licensed.

After the decision in the Dressel case, supra, the Motors Insurance Corporation filed applications for numerous persons connected with General Motors Automobile dealers, and the Superintendent of Insurance held hearings to determine whether or not the applicants intended to use their licenses principally in connection with automobiles sold by agencies with which they were connected, and in granting the licenses the superintendent found from the evidence that the applicants expected to secure most of their business from persons other than their own or employers' customers.

It clearly appears, therefore, that the interpretation placed on the added provisions of G.C. 644 made in 1935, was that there was a restriction against licensees placing insurance on motor vehicles sold by them or their employers, and this restriction was not limited to or determined by the vendor's interest, but was intended to apply to those transactions where the licensee or his employer had actually sold the particular automobile involved.

The purpose of the restriction was undoubtedly intended to prevent an unfair advantage in the placing of insurance and the licensing of persons who were not intending to do a general insurance business, but simply to supplement their primary business of selling automobiles.

This having been the interpretation of the provisions of G. C. 644, prior to the amendment of 644-3 when the added provisions for revocation were incorporated which were in effect those provisions of G. C. 644 added in 1935, it is concluded by the Court that the Legislature intended the same interpretation of the amended section 644-3 and that the restrictions with respect to insurance on property of which the licensee or his employer is the vendor applies to the time the sale is consummated, and the licensee is in an especially advantageous position to place the insurance.

This leaves then the question whether the statute so interpreted is violative of any constitutional right.

In this connection it must first be noted that it is generally recognized that the insurance business is one vested with a public interest and as such properly subject to government control.

See Verducci vs. Casualty Co., 96 O. S. 260.

Such being the case the right to engage in the insurance business is not an absolute right but a privilege accorded by the state granted upon specified terms and conditions. The restrictive provisions therefore in connection with the granting of licenses for selling insurance are not the deprivation of property nor do they afford special privileges. On the contrary, they seek to avoid special privileges being enjoyed or of which special advantage may be taken.

Counsel for plaintiff have cited numerous cases in support of their theory that legislative regulation of business is unconstitutional, most of which cases are readily distinguishable on the facts and will not be individually discussed.

The case most nearly comparable to the instant case is that of Houser vs. North British and Mercantile Title Insurance Co., 206 N. Y. 455, in which the New York Court held invalid a statute requiring an applicant for an insurance license to file an application stating that he "is engaged or intends to engage in good faith principally in the insurance business, or that he conducts or intends to conduct such business in connection with a real estate agency or real estate brokerage business."

The question naturally arises as to why an agent might not conduct an insurance business in connection with other business than the real estate business, and it is apparent that the law did not have a general application.

The syllabus of that case is as follows:

> "A statute under the guise of an exercise of the police power cannot arbitrarily interfere with that liberty of pursuit; the equal protection of the laws means equality of opportunity to all in like circumstances, and classification to be valid must not be arbitrary and discriminate against persons without a basis in reason."

In its opinion the Court said:

> "We may readily concede that, as a measure regulative of a business pursuit, which, from the extent to which it is carried on, is presumably, affected with a

public interest, the requirement by the Legislature of a license would not be an unreasonable exercise of power. That would afford an opportunity for inquiry into antecedents and fitness of character, and be a reasonable enough precaution in the public interest. But the Legislature has prescribed in this statute a condition for the issuance of the license, which is a purely arbitrary restriction. There is no good reason, and no public interest can, conceivably, be subserved in prohibiting persons from conducting the business of an insurance agent or broker, in connection with any other lawful business, or occupation in which they may be engaged."

This distinguishes that case from the instant one, where the restriction is general and not of limited application since it is referable to any kind of business.

The statute under consideration does not deprive any class, group or individual from securing an insurance license if he has the necessary qualifications and intends to use his license to conduct a general insurance business, qualified only by the provision that the license is not to be used primarily to effect insurance on his own property, or that of relatives, employees, employers, or that for which they or the licensee are or is agent, custodian, vendor, bailee, trustee or payee.

It, therefore, cannot be successfully maintained that the effect of the statute is to deprive any one from the right or ability or opportunity to secure a license to sell insurance.

In the case of Daniel vs. Family Security Life Insurance Co., 336 U. S. 220, the Supreme Court of the United States upheld the validity of a South Carolina statute forbidding undertakers to serve as life insurance agents.

From a reading of the Court's opinion and the note appended, containing reasons advanced before the legislative Committee when the law was under consideration, we must come to the conclusion that the law was aimed at the possible evil of a monopolistic control of a certain kind of life insurance, providing among other benefits, the payment of funeral expenses, for the reason that undertakers

would be in an advantageous position to effect such insurance.

The same argument was pressed in that case as is now voiced, namely, that an insurance lobby had secured the passage of the law, and the Court properly held that it was not equipped to decide the desirability of the law. The reasons inducing the legislation are immaterial, if a valid statute is enacted into law.

In the instant case it is not difficult to see that if automobile salesmen may be licensed as insurance agents without restriction or limitation, the effecting of all kinds of insurance involving automobiles could conceivably and reasonably become in theory, if not in fact, a monopoly controlled by that company or companies which were successful in having the automobile agents licensed to sell their insurance.

The prevention of such an eventuality could well have been the purpose of the legislature in enacting the law under consideration, which the Court determines is not in contravention with any of our state or national constitutional provisions.

Counsel stress the provision of the statute with respect to the word "solicit" and point out the difficulty of determining the percentage of solicitation as between the general public, and the restricted classes. The Court is of the opinion that this question will present little or no difficulty, and that only those solicitations which result in effecting insurance will be regarded. In other words, the word "solicited" is to be regarded as related to and to be interpreted with "place and effect", and a mere solicitation without method effecting any insurance would be disregarded.

After all, it is only the insurance actually placed which can give the superintendent any accurate information as to whether there has been any violation of the licensee's promise that his purpose is not principally to insure his own property and that of relatives, employers or employees or that for which they or he is vendor, etc.

Any abuse of discretion on the part of the Superintendent of Insurance in refusing to issue licenses because of any

questions relating to the insurance of property of which the licensee or his employer is vendor, is subject to review or correction by the courts, so that the agents' or prospective agents' rights are properly guaranteed.

The fact that a law may be difficult of application or the subject of administrative abuse does not of itself make the law invalid.

For the reasons stated, the Court has determined that the petition does not state facts sufficent to constitute a cause of action and therefore defendants' demurrer is sustained.

(S.) REYNOLDS,
Judge.

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